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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: LIN 05 056 51746 Office: NEBRASKA SERVICE CENTER Date: AUG 15 2006

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Soviet Scientist Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A), the Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 (1992), and Section 1304 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1436-1437 (2002).

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for an immigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this immigrant petition seeking classification as a Soviet scientist pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), the Soviet Scientists Immigration Act of 1992 (SSIA), Pub. L. No. 102-509, 106 Stat. 3316 (1992), and section 1304 of the Foreign Relations Authorization Act, Fiscal Year 2003 (FRAA), Pub. L. No. 107-228, 116 Stat. 1350, 1436-1437 (2002). The director determined that, based on the Department of State's inability to verify the beneficiary's exceptional ability in a program related to weapons of mass destruction, the instant petition could not be approved.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

Title 8 C.F.R. § 204.10(b) states in pertinent part:

> Eligible independent states and Baltic scientists means aliens:
>
> (1) Who are nationals of any of the independent states of the former Soviet Union or the Baltic states; and
>
> (2) Who are scientists or engineers who have expertise in nuclear, chemical, biological, or other high-technology field which is clearly applicable to the design, development, or production of ballistic missiles, nuclear, biological, chemical, or other high-technology weapons of mass destruction, or who are working on nuclear, chemical, biological, or other high-technology defense projects, as defined by the Secretary of Homeland Security, that are clearly applicable to the design, development, and production of ballistic missiles, nuclear, biological, chemical, or other high-technology weapons of mass destruction.

In addition, the regulation at 8 C.F.R. § 204.10(e) states that a petition filed on Form I-140 shall be accompanied by:

> (1) Evidence that the alien is a national of one of the independent states of the former Soviet Union or one of the Baltic States as defined in paragraph (b) of this section. Such evidence may include, but is not limited to, identifying page(s) from a passport issued by the former Soviet Union, or by one of the independent or Baltic states; and
>
> (2) A letter from the Department of State, Bureau of Nonproliferation that verifies that the alien possesses expertise in nuclear, chemical, biological, or other high-technology field or who has prior or current work experience in high-technology defense projects which are clearly applicable to the design, development, or production of ballistic missiles, nuclear, biological, chemical, or other high-technology weapons of mass destruction and endorses the applicant as having

> exceptional ability in one or more of these fields. Such endorsement shall establish that the alien possesses exceptional ability in the relevant field.

Moreover, 8 C.F.R. § 204.10(g) states that:

> Consultation with other United States Government agencies. USCIS may consult with other United States Government agencies, such as the Departments of Defense and Energy or other relevant agencies with expertise in nuclear, chemical, biological, or other high-technology defense projects. USCIS may, in its discretion, accept a favorable report from such agencies as evidence in addition to the documentation prescribed under paragraph (e) of this section.

The primary issue in the present matter is whether the director was correct in applying the regulations pertaining to section 1304 of the FRAA, effective May 25, 2005, in lieu of the regulations promulgated in the 1990s for the SSIA.

The instant petition was filed pursuant to the FRAA on December 17, 2004. As no regulations had yet been promulgated for the FRAA, the petitioner filed its request for an immigrant visa in accordance with the instructions provided by the regulations promulgated for the SSIA.

During the time the present petition was pending with the Nebraska Service Center, new FRAA regulations were issued, effective May 25, 2005, replacing the prior regulations issued for the SSIA at 8 C.F.R. § 204.10 (2005). Due to the change in the initial evidence requirements at 8 C.F.R. § 204.10(e), the director sent a request for evidence (RFE) to the petitioner on December 2, 2005, requiring a letter from the U.S. Department of State's Bureau of Nonproliferation attesting to his "qualifications or expertise in nuclear, chemical, biological or other high technology fields or verifying [his] work on such high technology defense projects."

In response, the petitioner submitted a letter dated January 12, 2006 from the U.S. Department of State's Bureau of International Security and Nonproliferation, stating that it could not "verify that the applicant is a Weapons of Mass Destruction (WMD) expert under rules established by the Citizenship and Immigration Services" (CIS). Counsel asserted, however, that (1) the FRAA extended 8 C.F.R. § 204.10 and that the instant petition was filed before these regulations had been changed; (2) the beneficiary neither claims to be nor do the regulations require that he be a WMD expert; and (3) sufficient evidence has been submitted to show that the beneficiary is an expert in the nuclear field, which is a field that is "clearly applicable to the design, development, or production of ballistic missiles, nuclear, biological, chemical, or other high-technology weapons of mass destruction."

On March 7, 2006, the director denied the petition. The director noted that the regulation at 8 C.F.R. § 204.10(e) was amended to reflect new evidentiary requirements and that the petitioner was advised through the RFE issued on December 2, 2005 of these new requirements. In response to the RFE, the petitioner submitted a letter from the U.S. Department of State, which indicated that it could not verify the beneficiary's exceptional ability in a program related to WMD. As such, the director concluded that the immigrant petition could not be approved and therefore denied the petition.

On appeal, counsel for the petitioner asserts that the decision: (1) failed to consider the evidence on record; (2) improperly gave retroactive effect to a regulation as it relates to the initial required evidence; (3) applied an erroneously narrow interpretation of the regulations; and (4) was contrary to national security interests of the United States.

Upon review, counsel's assertions are not persuasive. Despite the numerous grounds stated for appeal, the key issue in this matter is whether the director was correct in applying the FRAA regulations published in 2005 to a petition filed in 2004. Contrary to counsel's argument in response to the RFE, the FRAA amended and extended the SSIA, not the regulations that previously existed at 8 C.F.R. § 204.10. Moreover, in addition to amending the SSIA, section 1304 of the FRAA added additional provisions, including a consultation requirement. This new provision stated:

> The [Secretary of Homeland Security] shall consult with the Secretary [of State], the Secretary of Defense, the Secretary of Energy, and the heads of other appropriate agencies of the United States regarding—
>
> (1) previous experience in implementing the Soviet Scientists Immigration Act of 1992; and
> (2) any changes that those officials would recommend in the regulations prescribed under that Act.

Section 1304 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. at 1437 (2002).

It is therefore apparent that Congress did not require or even envision that the same regulations promulgated under SSIA would be used in administering the new program created by section 1304 of the FRAA. On the contrary, Congress specifically directed what is now CIS to consult with other departments in order to draw upon their experience with the prior program and to gather recommendations on what they would change with the new program. In other words, it appears Congress expected that the prior SSIA regulations would at most be used as a basis or foundation for the new regulations, not that they would be used in administering the new program.

In accordance with this directive, CIS consulted with the U.S. Department of State regarding a more effective means of administering the new program. 70 Fed. Reg. 21129, 21130 (Apr. 25, 2005). The supplemental information to the interim rule promulgated in 2005 provides the following details on the results of this effort:

> Based on discussions with the Department of State, USCIS has determined that a more effective administration of the new program (SSIA 2002-2006) can be achieved by requiring each applicant to submit a statement, signed by the Department of State's Bureau of Nonproliferation, attesting to his or her qualifications or expertise in nuclear, biological, or other high technology fields or verifying his or her work on such high technology defense projects. The Bureau of Nonproliferation has been in close contact with this group of scientists and with organizations that have employed them for a number of years and is better suited to represent the individual applicant's qualifications to USCIS. In addition, the

> Department of State's Visa Office usually coordinates with the Bureau of Nonproliferation and other appropriate agencies during the security advisory opinion process when a visa application involves a scientist or engineer from the former Soviet Union. USCIS has determined that this coordination, and resulting assessment by Department of State, is sufficient to meet the consultation requirements of the SSIA.
>
> Accordingly, § 204.10(e) provides that the signed statement issued by the Department of State's Bureau of Nonproliferation will be considered in lieu of the evidence of qualifications previously required under the old program. USCIS, however, reserves the right to consult independently with the Secretary of Defense, Secretary of Energy and other appropriate agency heads on the qualifications or expertise of a potential application under the SSIA and to accept favorable reports from such agencies in addition to the letter from the Department of State, Bureau of Nonproliferation.

Id.

Citing this section of the supplemental information, Counsel asserts on appeal that use of the phrase "in lieu of" means the required letter from the U.S. Department of State should be treated "'preferably,' 'alternatively,' 'by preference,' 'more readily'" over the evidence required under the prior regulations. In other words, counsel argues that CIS is still required to consider other evidence, i.e., the evidence the petitioner submitted attesting to the beneficiary's expertise in the nuclear field. Contrary to counsel's assertions, however, *Webster's II New College Dictionary* defines the term "in lieu of" to mean "In place of : INSTEAD OF." *Webster's II New College Dictionary* 633 (2001). Therefore, it is quite apparent that this part of the supplemental information was simply explaining why the prior required initial evidence, e.g., written testimony and other corroborative evidence, was being replaced by the U.S. Department of State letter requirement.

Counsel also argues on appeal that CIS retroactively changed the evidence requirements by requiring the letter from the Department of State for a petition filed before the effective date of the regulations. First, it should be noted again that the evidence requirements were not technically changed for the new program. At the time the petition was filed, the new program did not have any regulations. In order for prior SSIA regulations at 8 C.F.R. § 204.10 to apply, a petitioner would had to have filed under the prior program. According to 8 C.F.R. § 204.10(a) (2005), the prior program expired on October 24, 1996. As the present petition was not filed until 2004, the petitioner was ineligible for the first SSIA program. As such, the petitioner is only eligible for the current program enacted by section 1304 of the FRAA and, therefore, the prior regulations pertaining to SSIA do not apply.

Second, while the FRAA regulations were not enacted until nearly three years after the amended Soviet scientist program was enacted, once they became effective on May 25, 2005, the director was required to adhere to the requirements stipulated therein in adjudicating any currently pending petition filed under section 1304 of the FRAA. Where no preexisting rule exists, it is appropriate for new applications of existing law, clarifications, and additions to have retroactive effect. *See Pub. Serv. Co. of Colorado v. Fed. Energy Reg. Commn.*, 91 F. 3d 1478, 1488 (D.C. Cir. 1996). Even if prior FRAA regulations did exist and were changed as counsel alleges, petitions filed prior to May 25, 2005 could still be considered subject to the new

regulations. Provided notice and an opportunity to introduce evidence bearing on the new standard are given, courts have uniformly held that agencies are permitted to change a controlling standard of law and apply it retroactively in an adjudicatory setting. *Hatch v. Fed. Energy Reg. Commn.*, 654 F. 2d 825, 835 (D.C. Cir. 1981); *Consol. Edison Co. of New York, Inc. v. Fed. Energy Reg. Commn.*, 315 F. 3d 316, 323 (D.C. Cir. 2003).

As discussed above and in accordance with 5 U.S.C. § 554(b)(3), the director properly gave notice of the new evidentiary requirement to the petitioner and provided him with an opportunity to respond. CIS will not apply prior regulations promulgated for a now expired program as an alternative to the FRAA regulations simply because the new required evidence (i.e., the letter from the U.S. Department of State) demonstrates that the petitioner is ineligible for the requested visa. As previously discussed, this result would be contrary to the intent of Congress.

Accordingly, the director did not err in applying the newly promulgated FRAA regulations to the instant petition. In addition, as the petitioner failed to provide the required evidence from the U.S. Department of State attesting to the beneficiary's expertise or defense work in a field clearly applicable to WMDs, the director properly denied the petition on this basis. As such, the director's decision will be upheld and the petition denied.

As an additional note, counsel again cites the FRAA regulation's supplemental information at 70 Fed. Reg. 21129, 21130 (Apr. 25, 2005) and claims that the consultation language is further indication that CIS is required to consider other evidence beyond the letter required from the U.S. Department of State. Counsel also claims that CIS failed to consider a letter submitted for the record from a "researcher at the Brookhaven National Laboratories of the U.S. Department of Energy." First, this section of the supplemental information simply refers to 8 C.F.R. § 204.10(g), in which CIS reserves the right to consult with other relevant agencies and to accept, "in its discretion," favorable reports from these agencies as evidence in addition to the required Department of State letter. Second, it is clear from the record that the letter from Brookhaven National Laboratories was not the result of a CIS initiated consultation with the U.S. Department of Energy. Instead, it is simply a recommendation letter from a researcher at a laboratory managed by Brookhaven Science Associates for the U.S. Department of Energy. Regardless, even if a Department of Energy report favorable to the beneficiary were part of the record, the director is given complete discretion by the regulations in accepting such evidence as an addition to the letter from the Department of State.

Finally, while a CIS review of the evidence considered by the U.S. Department of State is not required by the regulations, it can be concluded from the record that the director found the evidence sufficiently lacking to warrant further review of the issue, i.e., consultations with other U.S. agencies regarding the claimed eligibility of the beneficiary. 8 C.F.R. § 204.10(g). Even assuming *arguendo* that the director was required to evaluate the same evidence already considered by the U.S. Department of State in making its determination, the evidence on record is insufficient to show that it is more likely than not that (1) the beneficiary possesses expertise in the nuclear or other high-technology fields clearly applicable to the design, development, or production of WMDs or (2) the beneficiary is working on a nuclear or other high-technology defense project that is clearly applicable to the design, development, and production of WMDs. 8 C.F.R. § 204.10(b)(2). In

this matter, the evidence only comments on the beneficiary's skill and knowledge in the nuclear field and makes no effort to link this knowledge to the design, development, or production of WMDs.

In response to the RFE, counsel argues that the nuclear field is clearly applicable in the design, development, or production of WMDs and, as an expert in the nuclear field, the beneficiary is therefore eligible. On appeal, counsel argues that the beneficiary's indirect contribution to the development of WMDs is all that is required.

Again, counsel's arguments are unpersuasive. Counsel appears to argue that simply being an expert in nuclear technology is sufficient, because the nuclear field is clearly applicable to the design, development and production of WMDs. First, counsel fails to address civilian, non-military applications of nuclear technology. In other words, the record has not established that all civilian nuclear expertise is clearly applicable to the production of WMDs. Second, counsel appears to misconstrue the regulations; it is a beneficiary's expertise which must be clearly applicable to the design, development and production of WMDs, not the field itself. 8 C.F.R. § 204.10(b)(2). In promulgating the nearly identical language of the SSIA regulations, the legacy Immigration and Naturalization Service stated the following:

> Congress intended to limit eligibility under the SSIA to scientists or engineers having expertise clearly applicable to the development or use of weapons of mass destruction. For example, a scientist who, in the course of conducting medical research, has developed a bio-chemical agent which can be used in biological warfare may, under [certain] circumstances, be able to establish eligibility for classification under the SSIA. On the other hand, a nuclear power plant engineer who cannot clearly demonstrate the requisite statutory expertise would be ineligible for SSIA classification.

60 Fed. Reg. 54027, 54028 (Oct. 19, 1995).

Absent evidence to the contrary, the record at most supports a finding that the beneficiary possesses expertise in civilian nuclear technology. In addition, there is no indication in the record that the beneficiary's work in the United States is related to any defense projects that are clearly applicable to the design, development, or production of WMDs. Again, simply being an expert in the nuclear field without providing evidence that the expertise is clearly applicable to WMD design, development, or production is insufficient. As such, the petitioner has failed to meet his burden of proof in this proceeding.

In conclusion, the record is not persuasive in demonstrating that the beneficiary has the requisite expertise which is clearly applicable to the design, development, or production of WMDs. In addition, counsel and the petitioner have failed to demonstrate that the beneficiary is working on a qualified defense project which is clearly applicable to the design, development, and production of WMDs. Accordingly, the petitioner has not established that the beneficiary is qualified as an independent states and Baltic scientist under 8 C.F.R. § 204.10(b).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.